No. 77-1785



# In the Supreme Court of the United States

OCTOBER TERM, 1978

KERR-McGEE CHEMICAL CORPORATION, PETITIONER

*v.*

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The court of appeals did not write an opinion. Its reasons for reversal are stated in the judgment (Pet. App. 9a-10a). The memorandum orders of the district court (Pet. App. 1a-6a, 7a-8a) are not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 28, 1978. The petition for a writ of certiorari was filed on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals properly reversed the order of the district court that had required the Secretary of the Interior to issue mineral leases to petitioner before the Secretary determined whether petitioner met the requirements for entitlement to such leases and before the Secretary completed environmental studies that he deemed necessary to evaluate the merits of petitioner's lease applications.

## STATEMENT

This case involves the application of certain regulations of the Secretary of the Interior, 43 C.F.R. Part 3520, 41 Fed. Reg. 18845-18848 ("1976 regulations"), to phosphate lease applications of petitioner that were pending before the Secretary when the regulations were promulgated. The regulations establish the procedures to be used by the Secretary in determining whether a lease applicant has satisfied the "valuable deposit" requirement of Section 9(b) of the Mineral Leasing Act of 1920, 41 Stat. 440, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. 211(b).[1] The regulations also define the term "valuable deposits" in

[1]That Section provides:

> Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.



Section 9(b). Their definition (43 C.F.R. 3520.1-1(c)) applies the "prudent man-marketability" test established by decisions of this Court;[2] under that test, a mining claim meets the valuable deposit requirement if a person of ordinary prudence would be justified in expending his time and money in developing the claim with a reasonable expectation that the mineral could be extracted and marketed at a profit. The Secretary's prior phosphate leasing regulations had repeated the statutory terms of Section 9(b) without providing further guidance (43 C.F.R. 3161.3-7 (1970)). The 1976 regulations were expressly made applicable to all pending and future applications (43 C.F.R. 3520.1-1(d)).

Petitioner's applications seek preference right leases to more than 6,500 acres of land in the Osceola National Forest, in north-central Florida. The applications were based on exploratory work conducted by petitioner under permits issued by the Secretary pursuant to Section 9(b) of the Act. The exploratory permits reserved the right to include "special stipulations to protect surface values" in any leases that might eventually be issued (J.A. 422).[3]

Petitioner filed its lease applications in 1969 and 1970. In March 1969 and December 1970, the United States Geological Survey (USGS) reported to the Eastern States Office of the Bureau of Land Management (BLM) that valuable deposits of phosphate had been discovered by petitioner during the permit period (J.A. 154). Those reports were based on evaluation of the quantity and quality of the mineral discovered. USGS did not evaluate the economic aspects of a mining operation on the lands

[2]*E.g.*, *United States* v. *Coleman*, 390 U.S. 599, 602-603; *Andrus* v. *Charlestone Stone Products Co.*, No. 77-380, decided May 31, 1978, slip op. 2 n. 4.

[3]"J.A." refers to the joint appendix filed in the court of appeals.

covered by the applications, as the prudent man-marketability test would require (J.A. 154-155).

No leases were issued. Instead, to fulfill his new responsibilities under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, the Secretary of the Interior directed that the environmental consequences of the proposed mining activity be examined in an environmental impact statement (EIS). It was also announced that no leases would be issued until the conclusion of the environmental review (Pet. App. 2a).

A draft EIS was prepared, public hearings were held in Florida, and written comments were received. Many of the issues raised concerned the impact of the proposed mining activities on endangered or threatened wildlife species and on the aquifer system that supplies water for northern Florida. A final EIS was published in 1974. The final EIS identified several endangered or threatened species that may inhabit the Osceola National Forest and concluded that, if those species do inhabit the Forest (which it could not conclusively determine), phosphate mining would destroy them. EIS, pp. III-22, IV-10, V-4, VII-3.

The EIS also identified areas downstream from rivers running through the proposed mining region as important aquifer recharge areas. Several possible impacts on water quality and quantity were discussed. These included depletion of aquifers from the use of well water for mining, resulting transfers of water between aquifers and contamination of aquifer water, and possible pollution of surface and subsurface waters by leakage from tailing ponds, most notably with radioactive radium 226, which is present in the phosphate ore. EIS, pp. III-12 to III-14, V-2, VI-1 to VI-2. Noting the limited knowledge of the



hydrology of the proposed mining area, the EIS suggested the need for further study. EIS, pp. III-12, IV-4, VIII-1.

The EIS and related documents recommended delay in the processing of lease applications until more knowledge could be acquired (J.A. 155-1 to 155-42, particularly 155-27 to 155-29, 155-32, 155-36). As a result of these recommendations, the Secretary in 1975 directed the USGS and the Fish and Wildlife Service to conduct a study to determine whether phosphate mining would damage or pollute the aquifer that provides the municipal water supply for Lake City, Florida, and supplies other water users in northern Florida, and whether it would injure any endangered or threatened species or destroy or modify any portion of a critical habitat of such species (J.A. 36, 149-153). The Secretary determined that the results of this study were necessary to supplement the EIS and comply with NEPA and also to assure compliance with the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 *et seq.*, particularly Section 7 of that Act, 16 U.S.C. 1536 (see *Tennessee Valley Authority* v. *Hill*, No. 76-1701, decided June 15, 1978). J.A. 150, 418-420, 422.

In April 1976, petitioner filed this action to compel the Secretary of the Interior to issue the mineral leases it sought. The State of Florida intervened as a defendant, opposing issuance of the leases to petitioner.

Shortly after the suit was filed, the Secretary promulgated his 1976 regulations. Because the prior USGS reports concluding that petitioner had found "valuable deposits" had not employed the prudent man-marketability test prescribed in these regulations, the Secretary (J.A. 150) and the responsible USGS official (J.A. 155) concluded that USGS must reexamine petitioner's applications in accordance with the new regulations. That reexamination would incorporate the

results of the environmental study and the supplemented EIS (J.A. 150). Those results were needed for the reexamination so that the costs of complying with environmental requirements could be included in the economic costs of the proposed mining operation (see 43 C.F.R. 3521.1-1(c)), and so that the terms of the leases could reflect the environmental findings (J.A. 150).

Rather than comply with the 1976 regulations, petitioner moved for summary judgment in the district court to compel the Secretary to issue the leases. The district court granted petitioner's motion and ordered the Secretary to issue the leases immediately (Pet. App. 6a). The court concluded that the USGS reports in 1969 and 1970 gave petitioner "an acquired and vested interest" in the leases (Pet. App. 5a).

The court of appeals summarily reversed the district court's order. The court stated (Pet. App. 10a):

> The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review.

The court remanded with instructions to dismiss the complaint (*ibid.*).

## ARGUMENT

The court of appeals reversed the district court's mandamus order because the applicable administrative processes, including those specified in the 1976 regulations, have not been completed and the Secretary has made no finding that petitioner has discovered a valuable deposit of phosphate within the permit areas. The court of appeals' judgment is correct and consistent with decisions of this Court.



1. The 1976 regulations are applicable to petitioner's pending lease applications. The Secretary of the Interior was not powerless to reject the findings of an official of the USGS (see J.A. 154), one of his subordinate officers, and call for new findings when he concluded that the original findings were based on an incorrect legal standard and did not take into account environmental concerns that Congress required him to consider.

As specified by Congress in Section 9(b) of the Mineral Leasing Act, note 1, *supra*, an applicant is not entitled to a phosphate lease unless he "* * * shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit * * *." 30 U.S.C. 211(b). The words of the statute make two points clear: the discovery must be of a "valuable deposit," and it is the Secretary who is empowered to decide whether such a discovery has been made.

"Valuable deposit" is a term of art. The test established by this Court is the "prudent man" test, supplemented by the "marketability" standard; under those tests, a mining claimant must demonstrate to the Secretary that the discovered deposit is one that a person of ordinary prudence would be justified in expending his time and money to develop in the reasonable expectation that the mineral could be extracted and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599, 602-603.[4]

[4]See also *Andrus* v. *Charlestone Stone Products Co.*, *supra*, slip op. 2 n. 4; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336; *Cameron* v. *United States*, 252 U.S. 450, 459; *Chrisman* v. *Miller*, 197 U.S. 313, 322. All these decisions were based on this Court's approval of the Secretary's adoption of this test in *Castle* v. *Womble*, 19 L.D. 455, 457.

Congress in the Mineral Leasing Act used the word "valuable" deliberately, with awareness of its judicial interpretation.[5]

But the USGS, in its 1969 and 1970 reports on petitioner's lease applications, did not apply the prudent man-marketability test in determining whether petitioner had discovered a "valuable deposit" of phosphate. USGS examined only "the quantity and quality of the discovered deposits" (J.A. 154). It did not weigh economic considerations such as the costs of extraction, transportation, processing, and marketing, or of compliance with environmental, reclamation, and safety requirements; nor did it examine the market for the mineral. Because USGS failed to apply the correct legal standard,[6] both the Secretary and the USGS have

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[5]During the House debate, Congressman Howard suggested changing "valuable" deposit to "paying" deposit. The floor manager, Congressman Sinnot, replied (58 Cong. Rec. 7537 (1919)):

> That language was put in with a great deal of consideration, and we would not like a change from "valuable" to "paying." There is quite a distinction. We are in line with the decisions of the courts as to what is a discovery, and I think it would be a very dangerous matter to experiment with this language at this time.

[6]In arguing (Pet. 12-14) that USGS did apply the correct criterion in its 1969 and 1970 reports, petitioner relies on Departmental actions relating to classification of mineral lands for exploration purposes, rather than actions relating to preference right leasing for mining purposes. Different standards govern the two purposes. "Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits," a prospecting permit may be issued under 30 U.S.C. 211(b). But issuance of a lease for mining under that section is dependent on a showing of "valuable deposits of phosphate." Whether a mineral is present in workable quantities is a different question from whether an economically profitable mine can be operated. The authorities cited by petitioner—*James C. Goodwin*, 9 I.B.L.A. 139; *Emil Usibelli*, A-26277 (unpublished decision, October 2, 1951); Department of the Interior, *Geological Survey Conservation Division Manual*, section 671.5.2 B(1)(1969)—all involve the workability question and hence are inapposite to the valuable deposit issue. The difference between the



properly concluded that new determinations are required to comply with Section 9(b). 43 C.F.R. 3520.1-1(d); J.A. 150, 155.[7]

The Secretary's authority to order this new determination is clear. The Secretary, together with the Secretary of Agriculture, still has control over these lands, as no leases have yet been issued. The Secretary of the Interior has supervisory authority over USGS (43 U.S.C. 1457; *Knight* v. *United States Land Association*, 142 U.S. 161, 181), and "[w]hen the Secretary has the duty to issue a patent or to furnish other evidence of title of a claimant, he must have authority to determine the questions of law incident to the performance of that duty." *West* v. *Standard Oil Co.*, 278 U.S. 200, 220; *Litchfield* v. *Register*, 9 Wall. 575, 577-578. The Secretary "has a continuing jurisdiction with respect to these lands until a [lease] issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." *Ideal Basic Industries, Inc.* v. *Morton*, 542 F. 2d 1364, 1367-1368 (C.A. 9); accord, *West* v. *Standard Oil Co.*, *supra*, 278 U.S. at 210; see also *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336-340. As stated in *Pacific Oil Co.* v. *Udall*,

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applicable standards is recognized in *Goodwin*, *supra*, 9 I.B.L.A. at 156-157 ("the test of workability under the Mineral Leasing Act differs from the prudent man rule * * *"); *Atlas Corp.*, 74 I.D. 76, 84 ("it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success"); and the *Conservation Division Manual*, *supra*, section 671.5.2B(6) (J.Sa. 248).

[7]The district court's conclusion (Pet. App. 5a) that the government did not contend that the law had been incorrectly interpreted by USGS was thus incorrect.

406 F. 2d 452, 456 (C.A. 10), in affirming the Secretary's refusal to reopen a patent application proceeding even though the BLM had taken contrary action:

> There is no question but that he has the power not to reconsider, and this he exercised in an effective manner when the matter came before *him* for the first time. The Secretary is the one who has this discretion and not his subordinates. [Emphasis in original.]

Indeed, when a subordinate has taken action inconsistent with the applicable law, the Secretary may reject the subordinate's act and take his own action based on the correct standard even if a lease has already issued. *Boesche* v. *Udall*, 373 U.S. 472, 476-477. The Secretary's authority to rectify the error and apply the correct legal standard to pending matters prevails even though the prior erroneous interpretation was made or endorsed by a prior Secretary (see *West* v. *Standard Oil Co.*, *supra*, 278 U.S. at 210), and even though it may have been of long standing. See *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266.[8]

The district court's statement that the USGS reports in 1969 and 1970 gave petitioner "an acquired and vested interest" in the leases (Pet. App. 5a) was correctly rejected by the court of appeals, which found instead that there were "ongoing administrative proceedings before the Secretary of the Interior" which the district court's writ of mandamus had aborted (Pet. App. 10a). The final decision on issuance of the leases rests with "the Secretary," as Section 9(b) of the Mineral Leasing Act states. That decision has not yet been made, having been

[8]See also *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 127 n. 15; *Automobile Club* v. *Commissioner of Internal Revenue*, 353 U.S. 180, 183-184.



postponed pending application of the 1976 regulations and the outcome of the new environmental studies.[9]

Petitioner has not been denied any substantive or procedural right. Petitioner remains entitled to submit lease applications and to have those applications ruled on by the Secretary in accordance with the applicable law. Retroactive application of a legal standard is not involved here. See *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 135. For this reason, *Greene* v. *United States*, 376 U.S. 149, and the other cases cited by petitioner (Pet. 15-17) are inapplicable. The decision in *Greene* turned on the fact that when the regulation there in question was changed, Greene's entitlement to compensation had been finally recognized by the agency and the reviewing courts. See *Thorpe* v. *Housing Authority*, 393 U.S. 268, 282 n. 43. Here, petitioner's claim to the leases had not been ruled on by the Secretary at the time when his new regulations and procedures went into effect.

2. Because the administrative processes have not been exhausted and the Secretary has not ruled on petitioner's applications, the court of appeals correctly held that judicial relief was unavailable. "To interfere now, is to take from the officers of the land department the functions which the law confides to them and exercise them by the court." *Litchfield* v. *Register*, *supra*, 9 Wall. at 578; see also *Best* v. *Humboldt Placer Mining Co.*, *supra*, 371 U.S. at 336-340. See generally *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52.

[9]On February 16, 1977, the Secretary informed BLM that he personally would make all final leasing decisions concerning phosphate leases.

Furthermore, the district court's writ of mandamus, ordering the Secretary "to issue said leases immediately" (Pet. App. 6a), was an improper remedy. Mandamus is available only when all the duties remaining to be performed are non-discretionary. *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420. Here, the Secretary of the Interior and the Secretary of Agriculture have discretionary decisions to make before any leases can issue—decisions not only on whether to issue the leases, but on the terms and conditions that should be imposed on any leases that are issued. See 30 U.S.C. 187, 352. Both Secretaries also have discretionary responsibilities to discharge with respect to the lease applications in order to comply with their duties under NEPA and the Endangered Species Act.

Even an applicant who has satisfied the "valuable deposit" requirement has no vested right to any particular form of lease. *Montana Eastern Pipe Line Company*, 55 I.D. 189, 191-192.[10] It is improper to grant mandamus or injunctive relief to force the execution of a lease where the material terms of the lease are still indefinite. *D. H. Overmyer Co.* v. *Brown*, 439 F. 2d 926, 929 (C.A. 10); *Hearst Radio, Inc.* v. *Good*, 91 F. 2d 555, 556 (C.A.D.C.).

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[10]Although there is a standard phosphate lease form, additional terms and conditions are almost invariably added. Petitioner conceded below that it is not entitled to any specific form of lease (Brief in Court of Appeals, note at page 36).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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